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No. 01-618

In The

Supreme Court of the United States

ERIC ELDRED, et al.,

Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE EDWARD SAMUELS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The question presented in this case is whether Congress had constitutional power to enact the Copyright Term Extenstion Act of 1998 (the "CTEA").

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INTERESTS OF AMICUS CURIAE[1]

This brief amicus curiae in support of the respondent is submitted pursuant to Rule 37 of the Rules of this Court.

I have been a professor at New York Law School for twenty-five years, teaching copyright, commercial law, and legal method. As an educator, and as an author and a user of copyrighted and public domain works, I am concerned for the continued incentives for creativity that are embodied in the copyright statute. I was not a supporter of the Copyright Term Extension Act of 1998, and have no particular opinion about whether it was wise or unwise to extend the term of copyrights by twenty years, as Congress did in that amendment. However, I am concerned that Congress not be unduly restricted in its ability to weigh the many complex issues and interests as it continues to adapt copyright to emerging markets and new technologies in an international environment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief reviews the historical context of the case. While it will consider the limited times provision and the application of the First Amendment, it will focus upon the history and meaning of the constitutional phrase "to

[1] Counsel for petitioners and respondent have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court. No counsel for a party, or anyone else except for amicus, has authored this brief in whole or in part, or made any monetary contribution in any form.

promote the Progress of Science and useful Arts." A review of that history will show that Congress, in extending the term of copyright by twenty years, acted pursuant to the power granted to it under the Constitution.

The 212-year history of copyright in the United States is a history of constant expansion of rights. The first copyright act of 1790 protected only maps, charts and books, but subsequent acts have added dozens of new creative works: prints in 1802, music in 1831, photographs in 1865, dramatic works in 1870, paintings, drawings and sculpture in 1870, movies in 1912, sound recordings in 1971, dance in 1976, computer programs in 1980, architectural works in 1990, and boat hull designs in 1998. During the same period, Congress has expanded the scope of rights to include not only the rights to copy and distribute works, but also the exclusive rights to perform certain works publicly in 1856, to create certain derivative works in 1870, to display certain works publicly in 1976, to preserve the integrity of and to claim authorship of certain visual works in 1990, to create and distribute recordings of live musical works in 1994, and to protect works by technological protection measures and the encoding of copyright management information in 1998. Congress has also expanded copyright by extending the term of copyrights in 1831, 1909, 1976, and 1998;[2] and by eliminating the

[2] Petitioners state throughout their brief that Congress has extended the term of copyright "eleven times in the past forty years." These statements are misleading, if not downright disingenuous. In the past 90 years (since the 1909 act established a maximum duration of 56 years), the term has been basically extended only twice, to life plus 50 years in 1976, and to life plus 70 years in 1998. The other nine extensions were interim extensions for roughly one- or two-year periods,

(Continued on following page)

formalities of notice, registration, deposit and renewal, primarily in 1988.

As Congress has expanded the rights of copyright owners, it has wisely balanced the expansion with dozens of limitations on those rights. Copyright does not cover works of utility, facts, or ideas. It does not prevent the distribution of works beyond the "first sale" authorized by the copyright owner. Copyright is subject to dozens of exceptions and compulsory licenses, particularly in the context of new technologies. And it is subject to the fair use doctrine, which authorizes users to make use of copyrighted works in limited contexts.

One of the great themes of U.S. copyright in the twentieth century was the extent to which we finally brought our own laws into conformity with international standards. Since 1886, the Berne Union defined the copyright standard for much of the rest of the world; it was

enacted between 1962 and 1974, so that copyrighted works would not go into the public domain pending adoption of the new 75-year term for existing copyrights. Pub. L. 87-668, 76 Stat. 555 (1962); Pub. L. 89-142, 79 Stat. 581 (1965); Pub. L. 90-141, 81 Stat. 464 (1967); Pub. L. 90-416, 82 Stat. 397 (1968); Pub. L. 91-147, 83 Stat. 360 (1969); Pub. L. 91-555, 84 Stat. 1441 (1970); Pub. L. 92-170, 85 Stat. 490 (1971); Pub. L. 92-566, 86 Stat. 1181 (1972); Pub. L. 93-573, 88 Stat. 1873 (1974). In no case did the extension exceed the 75-year term that was ultimately adopted by Congress in the 1976 Act.

Congress has hardly been headstrong in extending the term of copyright. In 1909 and throughout the twentieth century, many advocates of copyright proposed rejection of the "outmoded" structure of the Statute of Anne, and adoption of the life plus 50 year system that prevailed in most of the rest of the world. Had Congress adopted the more modern term in 1909, instead of 1976, there would have been only two term extensions in the last 170 years (since the extension to a maximum of 42 years in 1831), instead of the last 90 years.

not until 1988 that the United States was able to bring its laws within the requirements of that treaty, and join the international copyright community.

Petitioners focus upon only one aspect of this rich history. They argue that the constitutional grant of power to Congress to pass copyright laws "to promote the Progress of Science and useful Arts" requires that Congress act only for the purpose of increasing the public domain. A historical review will show that increase of the public domain was but one of many factors embodied in the constitutional phrase. To seize upon or overemphasize just one aspect of the phrase is to thwart its meaning, and bind Congress in ways inconsistent with the full meaning of the constitutional mandate.

ARGUMENT

I. The petitioners' novel theory equates the constitutional phrase "the Progress of Science and useful Arts" with an increase in the public domain.

Petitioners argue that the CTEA violates the "limited Times" provision of the copyright clause.[3] Perhaps recognizing that the life of the author plus 70 years, or 95

[3] Actually, although several amici take a different position, petitioners concede, at p. 14: "Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court." Petitioners' entire constitutional attack is directed at the application of the CTEA to existing works; their only argument against the application of the CTEA to works created after its effective date is that the different applications of the statute are inseverable. *Id.* at 48.

years, is obviously a "limited Time," the petitioners seek to link the limited times provision to an absolutely novel interpretation of the copyright clause. Petitioners essentially argue that the phrase "to promote the Progress of Science and useful Arts" is synonymous with an increase in the public domain. They argue that Congress may not decrease the public domain (an issue that is not before this Court, since the CTEA did not remove a single work from the public domain). Extending their novel theory, they argue that once Congress, pursuant to its constitutional power, has set a term of copyright, it is prohibited from extending that term, even if the term has not yet expired.

One of the many problems with this theory is that it simply proves too much. By this reasoning, every single extension of copyright from the 1790 act through the 1998 act, as well as many other acts adjusting the existing rights in copyrighted works, would be unconstitutional.

This Court has had occasion to hold that the originality requirement in copyright law is constitutional in scope. *See Trade-Mark Cases,* 100 U.S. 82 (1879); *Feist Publications, Inc. v. Rural Telephone Service Co, Inc.,* 499 U.S. 340 (1991). Seeking to bring this case within the reasoning of those cases, petitioners argue that the originality requirement is to be found in their novel interpretation of the "Progress of Science and useful Arts" clause. However, those cases were based upon the interpretation of the words "authors" and "writings," importing an originality requirement into the copyright power. There is no question in this case that the CTEA has been applied to any works except the original "writings" of "authors," fully within the scope of Congressional power. By petitioners' reasoning, original works of authorship would miraculously cease to be original once they have been created.

II. The constitutional phrase "the Progress of Science and useful Arts" is not directed primarily at the ultimate increase in the public domain.

A. In the state statutes passed under the Articles of Confederation, the "progress" of science and arts was to be achieved primarily by encouraging the creation and publication of new works.

There is little direct record of what the drafters of the Constitution intended when they adopted the phrase "to promote the Progress of Science and useful Arts." But much insight can be gleaned from the practice of the states under the Articles of Confederation, since it can be assumed that the drafters of the Constitution and of the first copyright act were familiar with the pre-existing state laws.

The preamble to the Massachusetts statute of 1783, which served as the model for New Hampshire and Rhode Island, read:

> Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind;

> Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind . . . .

Library of Congress, *Copyright Office Bulletin No. 3, Copyright Enactments of the United States 1783-1906* (1906), at 14. The preamble to Connecticut's 1783 copyright statute, which served as a model for the Georgia and New York statutes, stated that:

> Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind. . . .

Id. at 11.

From these preambles, it is clear that the inducement contemplated in the statutes is to "encourage learned and ingenious persons to write" (as stated in the Massachusetts statute) and to "encourage men of learning and genius to publish" (as stated in the Connecticut statute) their works. Although works were obviously intended to go into the public domain at the expiration of the copyrights, the "public good" wasn't something that would be achieved only at that later date; the "public good" was achieved at the outset by the creation and publication of the works.

B. The constitutional phrase "the Progress of Science and useful Arts" was directed at the creation and publication of works.

The Constitution grants Congress the power to pass copyright law as follows:

> Article I, §8. The Congress shall have Power: . . .
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

In *The Federalist No. 43* (Gideon ed., George Carey and James McClellan, ed., 2001), at 222, James Madison gave pretty much the only contemporary public explanation of the phrase when he said:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain, to be a right of common law. . . . The public good fully coincides . . . with the claims of individuals. The States cannot separately make effectual provision [for copyright], and most of them have anticipated the decision of this point, by laws passed at the instance of congress.

By the "public good," Madison could not have meant simply "the public domain," since the "public good" will not "fully coincide . . . with the claims of individuals" after the term of copyright has expired. What he meant was that the progress of science and arts depends entirely upon the creation and distribution of such works. Madison's focus

was, as the Constitution's focus was, as the earlier state statutes' focus was, on the creation and distribution of works.[4] Of course, it was assumed that works would ultimately go into the public domain, but that was as a result of the "limited Times" provision, not something necessarily envisioned within the "Progress of Science and useful Arts" clause.

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[4] Petitioners recognize at p. 23 of their brief the "quid pro quo requirement of the copyright clause." Under copyright law from 1790 through 1977, publication was generally the prerequisite for federal copyright. Since 1978, the only requirement has been "fixation" of an original work "in a tangible medium of expression." 17 U.S.C. §102(a). Even though copyrighted works are thus protected from the date of their creation, it is the genius of the copyright system that copyright owners only profit by making their works available to others, so they (and their publishers) have an ongoing incentive to publish. Thus, while the particular expression may be protected, the ideas and facts and other noncopyrightable aspects of the works are made available to the public, as described at p. 22, *infra*.

The "quid pro quo" is for the volitional acts of creating and publishing works. If part of the social "contract" is that works ultimately go into the public domain, then that aspect of the "bargain" is something of an adhesion contract for the authors. They have no choice whether or when their works go into the public domain, and can hardly be said to have acquiesced to any particular duration for protection of their works.

To continue the contract analogy, the "contract" with the author is not something that comes to an end upon creation, or even upon first publication of a work. Rather, the rights and incentives are more in the nature of an executory contract, with ongoing incentives to continue to distribute the work for the entire period of the copyright owner's exclusive rights.

C. The plain meaning and logical understanding of the constitutional phrase is that it was directed at the creation and dissemination of works.

The Copyright Clause of the Constitution is the only enumerated power within Article 1, section 8, that mentions the "purpose" for which it was enacted. Why might the framers have chosen to add that language, instead of empowering Congress to grant exclusive rights to authors and inventors without limitation? Possibly, the framers were simply following the pattern of the prior state enactments. The "whereas" clauses in the preambles explained the purposes of the earlier statutes, but they can hardly be read as specific limitations upon the rights granted under those statutes.

The other model for the structure of the constitutional phrase was the Statute of Anne, adopted in England in 1710.[5] That act was entitled "An Act for the Encouragement

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[5] 8 Anne c. 19 (1710). Several briefs in favor of petitioners link the Statute of Anne to the prior history of monopolies under the Stationers' Companies licensing acts. As clarified in Edward Samuels, *The Illustrated Story of Copyright* (2000) at 16-17:

> Some modern critics of the expansion of copyright delight in emphasizing the embarrassing precursor to the Statute of Anne, suggesting that copyright has been forever tainted by the fact that it evolved from what were essentially censorship laws. However, there was a critical gap in protection, from 1694 through 1710, and the new Statute of Anne was not simply an extension of the previous law. Parliament seems not to have been guided by the complaints of the publishers, who in 1709 had lobbied for a return to the old licensing acts. Instead, they were obviously influenced by the pleas of several famous authors for the recognition of rights not of printers, but of authors. . . .

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of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." It is hard to imagine how the words "Encouragement of Learning" provided any particular limitation upon what rights were granted.[6]

Petitioners would have us believe that "Science and useful Arts" does not "Progress" until someone, such as petitioner Eldred, has made a work available to the public free of charge. But that certainly isn't the common sense meaning of "Progress of Science and useful Arts." Millions of works are created, published, read, and commented upon every year. Some of the greatest works receive

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> One way of putting the Stationers' Licensing Acts into perspective is to realize that they were not the spiritual precursors to copyright at all. However, because the crown and the publishers had found a way to protect the rights of publishers, and the publishers were accordingly willing to pay authors for their creations, a satisfactory solution had been worked out that eased the pressure for a more direct copyright law to protect authors. Once the stopgap measure was removed, the need for the protection of authors' rights came to the fore.

[6] As stated in H.R. Rep. No. 94-1476 to accompany S. 22 (the 1976 Act) at 133: "The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law." The petitioners and their amici supply dozens of quotes from one side of this debate to create the impression that there was general consensus on the shortest possible copyright term. One can only marvel at the audacity of Profs. Ochoa et al. in attaching to their amicus brief a 7-page appendix of an anonymous letter strenuously advocating one side of this debate almost 300 years ago. The "consensus" that actually developed over the years in this country, in England, and throughout the European Union is a copyright term of life plus 70 years.

accolades and criticism, and literary and other awards, shortly after their publication, for the contribution that they make to the arts and sciences. For example, the Nobel Prizes are awarded to those who "shall have conferred the greatest benefit on mankind." Under the Nobel rules, "To be eligible to be considered for a prize, a written work shall have been issued in print or have been published in another form." http://www.nobel.se/nobel/nobel-foundation/statutes.html. Pulitzer Prizes are awarded for "work done" and "published" or "performed" during the prior year. The public value of the works is hardly diminished by the fact that they will not go into the public domain for many years.

Authors who make "transformative" uses of copyrighted works should and do have wide leeway to produce their works under the fair use doctrine, as illustrated by this Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and the Eleventh Circuit's decision in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). Petitioners, however, are not such "creators" who desire to make transformative uses of existing works; instead, their businesses, for the most part, are in making already existing works available over the Internet or otherwise. While this may be a valuable service to some who use it, it does not result in any immediate "Progress" of "Science and useful Arts," since the works that they distribute are works that have already been published, almost all of which are already available (although of course for a fee) from other sources.[7]

[7] Many or most of the works that petitioners want to distribute are of course the "successful" works that are already available to the public. For example, Kahlil Gibran's *The Prophet*, which, we are told at p. 3 of

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III. U.S. statutes that extended the duration or altered the scope of copyright have applied the new terms to existing works, inconsistent with the novel theory proposed by petitioners.

A. The copyright act of 1790 applied to pre-existing as well as to prospective works.

The first copyright act, passed in 1790 in the first Congress, was entitled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." 1 Stat. 124. That act was inconsistent with petitioners' theory that Congress may not constitutionally extend the duration of existing works. Most states already had copyright laws that created exclusive rights for periods varying from a minimum of 14 to a maximum of 28 years. Under the 1790 act, the

petitioners' brief, Dover anxiously wants to publish, is already available in many editions, including a new hardcover copy on amazon.com for $10.50, or a paperback edition for $5.95. Some works are indeed out of print in this country; petitioners' intellectual property law professors' brief highlights the out-of-print status of H. G. Wells's 1933 novel, *The Shape of Things to Come*. However, they seem not to appreciate the ease with which copies even of out-of-print books can be obtained in the days of the Internet. Amazon U.K. lists a paperback edition for £4.79. Under this Court's ruling in *Quality King Distributors, Inc. v. L'anza Research International, Inc.*, 523 U.S. 135 (1998), it is not a violation of anyone's copyright to order individual copies of copyrighted works from other countries.

Indeed, under the first sale doctrine, copies of works that have been legitimately sold in this country may be resold, and even out-of-print works may be obtained at specialty sites such as abe.com ("Advanced Book Exchange"). As of the middle of June, 2002, abe.com listed 95 available copies of *The Shape of Things to Come*, including some for as little as $7, and 45 from U.S. sources for as little as $10.

authors of existing works, even if they had already received up to seven years of protection under the prior state laws (from 1783 to 1790), or even if their works might have gone into the public domain because they were from a state that hadn't yet passed an effective copyright law, were entitled to begin their copyrights anew under the 1790 statute.

B. Subsequent copyright acts that extended the duration of copyright are inconsistent with petitioners' novel theory.

All subsequent copyright acts that have extended the term of copyright – to a total of 42 years from the date of publication in 1831, 4 Stat. 436, 56 years from publication in 1909, 35 Stat. 1075, life of the author plus 50 years in 1976, 90 Stat. 2541, and life of the author plus 70 years in 1998, 112 Stat. 2827 – have specifically applied the extension to existing works. This application of new terms to existing works was not some incidental outcome, but was specifically considered by Congress. For example, in the 20 years of legislative history leading up to the 1976 Act, Congress carefully considered the varying means for measuring the term of copyright.[8] Although it adopted the

[8] There is some inevitable "disharmony" that results from measuring new copyrights from the date of the author's death, and measuring old, and some new, copyrights from the date of publication. Petitioners try to make much of the inevitable disparity. For example, they state at p. 3 that "As applied to an author who produced throughout a long lifetime in the pattern of Irving Berlin, the current rule would produce a term of 140 years." The statement is misleading. The 140 year term would apply only to such an author's early works; works produced shortly before an author's death would endure only for a little over 70 years under the CTEA.

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life plus 50 year term for works created after the effective date of the statute, Congress chose to continue to measure the term of existing copyrights (and works made for hire and pseudonymous and anonymous works) from the date of publication.[9]

Furthermore, Congress considered that it might be unfair to grant the benefits of the 19 year term extension to licensees who may have paid only for a shorter license term; accordingly, Congress established in section 304(c) an elaborate provision for "termination," or recapture, of the extension term for the benefit of the authors or their heirs. In this way, the term extension was not necessarily a "victory" for the large corporations that may have owned many of the copyrights, since in many cases they had to renegotiate the rights with the original authors or their heirs.

Under the 1976 Act, life plus 50 years actually resulted in a *shorter* duration of copyright for works produced toward the end of an author's life. Such works would be protected for a little over 50 years, less than the 56-year maximum under the 1909 law. Congress concluded that, *on average,* the life of the author plus 50 years was the equivalent of about 75 years from publication; but, of course, in individual instances, it might be more or less. That's the inevitable result of using two different methods for computing the duration of copyright. This disparity also accounts for much of the "disharmony" in international relations emphasized by the petitioners and several amici's briefs.

[9] The 1976 Act provided that anonymous works, pseudonymous works, and works made for hire would be protected for 75 years from publication, or 100 years from the date of creation, whichever expired first. The CTEA provides that such works are protected for 95 years from publication or 120 years from creation, whichever expires first. Petitioners can hardly complain about the 100- or 120-year periods from the date of creation, since those terms are much shorter than the rights "in perpetuity" that applied to unpublished works from 1790 through 1977. *See* this section, *infra*.

While Congress in 1976 extended the term of copyright for works that had already been published, it significantly decreased the term of protection for works that were not yet published. Under prior law from 1790 through 1977, state common law copyright in *unpublished* works had extended in perpetuity. Under the new act, Congress brought works under the federal system of copyright beginning from the date of "fixation" in a "tangible medium of expression" (rather than from the date of publication) and preempted state common law copyright in unpublished works. In section 303, Congress provided that copyright in previously created but unpublished works would be measured by the life plus 50 year term. However, in order to prevent "old" unpublished works from immediately going into the public domain, Congress provided that no such works would go into the public domain before December 31, 2002, at the earliest; and, to encourage publication of such "old" works, Congress provided that if such "old" works were published by the end of the year 2002, they would be granted additional protection until the year 2027. In any event, since the duration of copyright for unpublished works was reduced from "in perpetuity," and since some copyrights actually received a *shorter* term of copyright under the new Act (note 8, *supra*), the net effect of the 1976 Act was not simply to "extend" the term of copyright, but more precisely to "adjust" the term of copyright.

While Congress's prior enactments of course do not definitively decide the constitutional issue facing the Court, they do evince a practice of careful deliberation that has been clear and consistent from the first copyright act of 1790 to the copyright act of 1998. Each of these statutes, affecting the terms of existing as well as future copyrights, is inconsistent with the novel constitutional theory proposed by petitioners.

C. Other copyright acts have expanded the scope of copyrights, including existing copyrights, and are thus inconsistent with petitioners' novel theory.

Extension of the copyright term is not the only way in which Congress has expanded the scope of copyright over the years. To give just a few examples, owners of previously copyrighted works saw their rights expand when Congress added the right to receive payment under a compulsory licensing system for cable retransmissions in 1976 (17 U.S.C. §111); a public display right in 1976 (§106(5)); certain moral rights in 1990 (§106A); and digital performance rights in sound recordings in 1995 (§106(6)). Such additional rights could not possibly represent an incentive to the original copyright owners to create their works; and so, by petitioners' logic, Congress should never have been able to add to the rights in such works already in existence. Yet it is absurd to assume that Congress does not have the power to make periodic adjustments to the scope of existing copyrights.

Congress has "decreased" the public domain (in the sense that it has passed laws slowing the rate at which works go into the public domain) in many other ways besides the extension of the copyright term. For example, many more works traditionally went into the public domain as a result of failure to use the copyright notice, failure to register, or failure to renew, than have gone into the public domain because of expiration of copyright. (If, as petitioners assert, only 15% of copyrighted works were generally renewed, then 85% of the works went into the public domain when they were not renewed.) When Congress in 1988 eliminated the copyright notice and registration requirements as part of its obligations under the

Berne Convention, Article 5(2), and when in 1992 it provided for automatic renewal of copyrights still in their first terms, it "rescued" many more existing works from going into the public domain than it did when it passed the CTEA.[10] Again, by petitioners' logic, these "assaults" on the public domain should never have been allowed.

IV. The "Progress of Science and useful Arts" involves dozens of considerations beyond merely the devolution of copyrighted works into the public domain.

A. Congress should, or should certainly be entitled to, consider the international setting in deciding what constitutes the "Progress of Science and useful Arts."

One of the major accomplishments in U.S. copyright in the latter part of the twentieth century was the internationalization of copyright standards, prompted to a large

[10] Petitioners argue at p. 7, and repeat in note 13 on p. 30, that the problems they associate with the copyright term extension are compounded by the fact that "renewal" has been "automatic" since 1992. They argue that 375,000 copyrights have been "blocked" in order to "protect" 77,000 commercially viable works. (*But see* note 16, *infra.*) They then argue that "under current law," as a result of automatic renewal, "3.35 million works would be blocked to protect 77,000." That is a misleading characterization of the effects of the law. The 1992 amendment that made renewal automatic applies to works that were created between 1964 and 1977, inclusive. The only works created between 1923 and 1963 that were still under copyright, and therefore subject to the 1998 term extension, were those that were in fact renewed by the copyright owners. Those works published between 1923 and 1963 that were not registered for renewal already went into the public domain, and were not extended by the 1998 act.

extent by the internationalization of trade and technology. The 1790 act had protected only U.S. authors. It was not until 1891 that foreign authors were granted at least some minimal level of protection, although that protection, because of copyright formalities, was often more illusory than real. The situation was an embarrassment within the international copyright community, and undermined the ability of U.S. trade negotiators to encourage other countries to enhance their copyright protection of foreign – including U.S. – books, music, movies, and computer programs. Finally, in 1988, the United States joined the rest of the world by adhering to the Berne Convention. *See generally* Edward Samuels, *The Illustrated Story of Copyright* 230-48 (2000).

The Berne Convention provides that all member countries must protect copyright for a minimum term of life of the author plus 50 years, Berne Article 7(1), and eliminate all formalities as prerequisites to copyright, Article 5(2). The extension of copyright to life plus 50 years, as provided in the major overhaul of U.S. copyright law in 1976, and the elimination of formalities in the Berne Implementation Act of 1988, were therefore absolute prerequisites to U.S. adherence to Berne.

Not only does Berne require a term of life of the author plus 50 years, but it also requires that member countries grant that term to all works that have not already gone into the public domain in a particular country. As provided in Article 18(1): "This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection." Thus, the term extension for existing works still

under copyright protection was an absolute necessity for joining Berne under Article 18(1).[11]

The 1998 extension, from life of the author plus 50 years to life of the author plus 70 years, was not required under our international obligations. However, it was designed to match the term of copyright recently adopted throughout the European Union and by other countries. Under Article 7(8) of the Berne Convention, countries with the life plus 70 year term do not have to recognize the rights of foreign authors whose works have expired in their own countries.

Since the United States is a net exporter of copyrighted works, it certainly made sense for the United States to grant the longer term, and thereby allow U.S. authors to take advantage of the longer term available abroad.[12] And, since the United States was simply

[11] If the extension of copyright terms under the CTEA is unconstitutional, then the 1976 extension of the duration of copyright would presumably be void as well. That result would put the United States in violation of our obligations under Berne, with potentially disastrous international consequences. About the only way to distinguish the 1976 extension would be to uphold it under the treaty power of the Constitution. If that were done, however, then presumably the President could negotiate a term of life plus 70 years with the European Union countries, present the package to Congress as part of our international obligations, and reinstate the very provisions this Court is being asked to strike down. If the provisions can be reinstated in that way, will it have been worth the price in the form of the millions of transactions and billions of dollars that will have been upset by the decision?

[12] Although the laws of other countries may reflect different cultures and different histories, it is nevertheless instructive to consider how other nations have set about dealing with common problems of enforcing copyright in an emerging global technology. As

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matching the longer term available in other countries, it is not likely that Congress, absent the strong international considerations, will extend the U.S. term of copyright yet again. Petitioners' suggestion that Congress will continue to grant further extensions whenever the copyright industries ask for them is simply not a likely scenario.[13]

Petitioners suggest that the drafters of the Constitution would be horrified at a term of life plus 70 years, or 95 years for existing works. In 1790, the term of copyright adopted by Congress matched the British, and what would become the international, standard of the day. Would the framers of the Constitution be shocked to learn that Congress had, over the years, extended the term of copyright to match the expanding international norm? It is more likely that they would be shocked if we had not done so. Were Madison to view the state of international trade and technology today, he might well conclude, as he did about the individual state statutes in 1790, that one

stated by Justice Breyer in *Printz v. U.S.*, 521 U.S. 898, 977 (1977) (Breyer, J., *dissenting)* (in the context of the Brady Act):

> Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. . . . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . .

[13] Petitioners and several amici suggest that Congress passes whatever legislation the entertainment industries ask them to pass. This would come as news to these industries. For example, James Lardner documents how the movie industries were rebuffed by Congress in their efforts to get either a home taping royalty or an exemption from the first sale doctrine to cover movie rentals. *See generally* James Lardner, *Fast Forward: Hollywood, The Japanese, and the VCR Wars* (1987), at 187 and 218.

country "cannot separately make effectual provision" for copyright, and that most countries today have "anticipated the decision of this point" by passing laws in conformity with international standards. Cf. *The Federalist No. 43* (Gideon ed., George Carey and James McClellan, ed., 2001), at 222.

B. The "Progress of Science and useful Arts" includes many considerations other than the public domain.

Many of the major theories and limitations of copyright adopted over the years do in fact, and were intended to, promote the "Progress of Science and useful Arts." For example, this Court has noted the "First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use," *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 560 (1985).[14] Works of utility (§101, definition of "pictorial,

[14] The petitioners' intellectual property law professors' brief states at p. 26 that "One of the most troubling aspects of copyright in recent years is that the limitations on copyright liability, including the idea-expression distinction and fair use, have been steadily shrinking via judicial construction. . . . " This statement is absolutely wrong. While this Court held in the *Harper & Row* case that fair use did not authorize the taking of 300-400 words of an unpublished manuscript, this Court's clarification of the wide scope of fair use in a parody context, *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994) has been embraced by the lower courts. *See, e.g., Leibovitz v. Paramount Pictures Corp.,* 137 F.3d 109 (2d Cir. 1998) and *Suntrust Bank v. Houghton Mifflin Co.,* 268 F.3d 1257 (11th Cir. 2001). In the context of new technologies, this Court held in *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417 (1984) that fair use included the "time-

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graphic, and sculptural works") are not covered by copyright, but are free for the taking. The first sale doctrine (§109), the numerous compulsory licenses, the limitations in section 110 protecting various performances, the exclusion of protection for government works (§105), the limitation of copyright protection to "original works of authorship" (§102), the special rules for library photocopying (§108), the many definitional limitations in section 101, and the fact that copyright doesn't prevent all uses of copyrighted works, but only those enumerated in the exclusive rights sections 106 and 106A, all in their own way foster the "Progress of Science and useful Arts."

Sometimes it is by limiting rights, and sometimes it is by granting rights, that the arts "progress." As viewed by Madison and other framers of the Constitution, p. 8, *supra*, the rights of copyright owners were largely aligned with, not opposed to, the progress of science and useful arts. As stated by Justice O'Connor in *Harper & Row, Publishers,*

shifting" of television programs through the use of home video recorders. This Court's holding in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.,* 499 U.S. 340 (1991), while not an "idea/expression" case, was founded upon the related fact/expression distinction. *Computer Associates Int'l, Inc. v. Altai, Inc.,* 982 F.2d 693 (2d Cir. 1992) and similar cases have resulted in a "thin" copyright for computer programs, based upon concepts related to the idea/expression distinction and the works of utility doctrine. The holding in *Recording Ind. Ass'n of America v. Diamond Multimedia Systems, Inc.,* 180 F.3d 1072 (9th Cir. 1999) that the Digital Millennium Copyright Act did not apply to the popular RIO MP3 music player, while decided on the technicalities of that statute, was a major victory in what might be considered a fair use context. It's hard to imagine how the petitioners' copyright law professors can conclude that the basic limitations of copyright have not been doing their historical job of balancing the rights of copyright owners and users.

Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985), "[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas. . . . " There is hardly a principle of copyright that does not reflect a careful balance between the rights of copyright owners and copyright users. It is presumably precisely because the balance is so intricate and delicate that the framers of the Constitution assigned to Congress the task of setting copyright policy.

Although the issue before this Court does not directly involve the Internet or other new technologies, petitioners and several amici in favor of petitioners suggest that their interests are allied with the Internet, and that a decision against them will somehow inhibit the development of this new technology. At pp. 5-6 of their brief, for example, petitioners suggest that Mr. Eldred's website is simply the Internet equivalent of a public library, and that he should be entitled to some online equivalent of the first sale doctrine.

If Mr. Eldred wants to "compile" a "collection" of Robert Frost books, he is perfectly free to do so under the first sale doctrine. But if petitioners think that posting HTML versions of those works on their Internet website is or should be the online equivalent of the Derry New Hampshire Public Library's lending of a particular copy to members of their community, then they are fundamentally wrong. The Derry library maintains individual copies of their books; when they are lent out, they are unavailable to others. Works that are "posted" on the Internet, on the other hand, can be viewed simultaneously by hundreds or

thousands of users, copied instantaneously to their computers, and redistributed in multiple copies around the world. As demonstrated by the Audio Home Recording Act of 1992, the Digital Performance Right in Sound Recordings Act of 1995, and the Digital Millennium Copyright Act of 1998, the proper Congressional response to the digitization and posting of works is not a blanket exemption, but a careful balancing of interests. Even with the first sale doctrine, libraries are also subject to the elaborate provisions of section 108 to ensure that their copies are not systematically used to make copies of works.

If petitioners want a "first sale" equivalent for the Internet, they'll have to convince Congress of its advisability. Their ability or inability to get a special exemption during the life of a particular copyright, however, should have nothing to do with the issue before this Court: whether Congress acted within its constitutional authority when it extended the duration of copyright in the CTEA.

C. The CTEA incorporates many provisions designed to achieve an overall balance between the interests of copyright owners and copyright users.

In enacting the CTEA, Congress again gave careful consideration to balancing the interests of copyright owners and copyright users. For example, Congress coupled copyright term extension with the so-called "Fairness in Music Licensing Act," which, in amending section 110(5) and adding section 513, put limitations on the enforcement of public performance rights by music copyright holders. Responding to the concerns raised by library representatives, Congress added a new subsection 108(h), which provides for an expanded library exemption

for the reproduction of copyrighted works during the last 20 years added by the act.

As explained at p. 16, *supra*, "old" unpublished works were slated to go into the public domain after December 31, 2002. As originally proposed, the CTEA would have extended the protection of such works by an extra ten years. S. Rep. No. 104-315 to accompany S. 483 (1996) at 5-6. Responding to the concerns raised in the committee hearings, however, Congress determined that no extension should be given for the protection of these works (although Congress did extend by 20 years, to 2047, the "extra" protection granted to such works as an inducement to get them published by the end of 2002). Thus, thousands, or millions, of unpublished works, including private letters dating back to the early history of the United States, will first go into the public domain after December 31, 2002, demonstrating Congress's sensitivity to the value of the public domain.

As with the 1976 term extension, Congress was concerned that the authors or their heirs, rather than the copyright licensees, be the ones to receive the benefit of the 20 year term extension. Accordingly, Congress provided a new termination right in section 304(d) for authors or heirs who did not previously take advantage of the termination provided in section 304(c).

Congress did not provide, either in 1976 or in 1998, for a termination right in works made for hire. However, in the CTEA, Congress did take the extraordinary step of adopting a sense of Congress that owners of audiovisual works should make arrangements to share the value of the additional 20 year extension with those who participated

in the creation of the works. Section 105 of the CTEA provides:

> It is the sense of the Congress that copyright owners of audiovisual works for which the term of copyright protection is extended by the amendments made by this title, and the screenwriters, directors, and performers of those audiovisual works, should negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements with respect to the establishment of a fund or other mechanism for the amount of remuneration to be divided among the parties for the exploitation of those audiovisual works.

Although this sense of Congress does not have the force of law, it presumably puts the industry on notice that, should such negotiations not be forthcoming, Congress might consider enacting legislation to force the copyright owners to share the benefits of the copyright term extension (assuming, of course, that this Court doesn't bar Congress from making ongoing adjustments to existing rights of copyright).

D. Although Congress has considered many factors in promoting the "Progress of Science and useful Arts," it has never embraced a strict economic efficiency analysis.

The petitioners' economists' brief begins with the statement, at p. 2: "One possibility is that Congress sought a policy that confers a net economic benefit, after subtracting the expected costs." But, despite the attempts by some scholars to test all copyrights on the Procrustean bed of economic efficiency analysis, Congress has simply never limited itself to such an approach. The moral rights

provided in section 106A, the termination rights of sections 203 and 304(c), and dozens of other rights and limitations don't lend themselves to economic evaluation. One might just as easily suggest that copyright is based upon a natural rights or property rights[15] theory. The pre-1790 statutes, in their preambles, make reference to "natural rights" and "property rights."

One of the basic problems with an efficiency analysis of copyright is that many of the variables involved in the copyright industries simply are not quantifiable. For example, in making the argument that increased revenues for the copyright industries will not result in any greater investment in future works, the economists blithely suggest at p. 9 of their brief that "In general, a profit-maximizing producer should fund the set of projects that have an expected return equal to or greater than their cost of capital." One is reminded of the proverbial critic who, upon being told that only one out of ten movies makes money, responded, "Then only invest in the ones that make money." Of course, if one knew in advance which multimillion-dollar movies would be successful, one would have no difficulty making money.

The fact is that the copyright industries are based upon products that usually have, at the outset, an undeterminable value. One book sells, another doesn't; one movie is a

[15] When it serves their interests, petitioners are not averse to using a property law analogy. "Copyright law had, in effect, vested in these petitioners, as well as in the public, a remainderman interest in the works at stake." Petitioners' brief at 6. Of course, a remainderman is only "one who is entitled to the remainder of the estate after a particular estate carved out of it has expired." *Black's Law Dictionary* (abridged 6th ed., 1991).

blockbuster, the other a disaster. If one were to do an economic analysis, one would probably conclude that, given the unlikelihood of success, it is hardly ever worth publishing a book or producing a play or a movie. It is precisely because the chance of success is so small that we have to make the reward for success great.[16] The copyright industries are made up, to a large extent, of what the economists call "sub-par projects," and it would be a mistake to leave to the economists the choice of which works to subsidize.

[16] Petitioners at p. 7 make an argument similar to that contained in the economists' brief, that the "cost" to society of "withholding" lots of copyrighted works exceeds the "gain" to be realized by those few copyright holders who have "surviving works" (defined by petitioners as "works that continue to earn a royalty"). The argument is fallacious.

The petitioners effectively divide all works into two categories, those that have commercial viability, and those that don't. For those that don't have commercial viability after dozens of years – the vast majority of works – there really isn't much "cost" in tying them up in copyright or otherwise. We might as well leave them in the control of people who have a sentimental or other noncommercial interest in them, since such people are more likely to preserve or disseminate the works. The works that second-comers are most interested in reproducing, however, are precisely the same "surviving works" that have commercial viability to the original creators or their heirs. Assuming that a given work has some remaining commercial viability, then, it is a worthwhile question to ask: is it more "fair" to grant whatever value there may be to the creators, their heirs, or the company that absorbed the initial cost and took the initial risk in creating the work, or to pass the remaining commercial value to the free-rider who waits until a work's commercial success is proven, and then jumps in to take advantage? But, of course, economic analysis doesn't factor in what is "fair." Maybe that's why Congress doesn't particularly limit itself to economic analysis in deciding who should control the further dissemination of creative works.

CONCLUSION

The various extensions of copyright over the years, balanced by careful limitations on the rights of copyright owners, are not the result of some nefarious scheme by corporations to cheat the public of their rights. Rather, they are part of the remarkable system envisioned by the framers of the Constitution, and implemented by the Congress and the President, to "promote the Progress of Science and useful Arts" by doing exactly what the Constitution says they are supposed to do, "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." As argued by Ralph Oman, Former Register of Copyrights, in a letter to the editor of the *Washington Post* on March 11, 2002, p. A20, authors went along with the various exceptions and limitations on their rights because of the "promise of a longer term of protection. It would be a switch-a-roo worthy of Lucy yanking away Charlie Brown's football if the Supreme Court removed the carrot and left the authors with the dirty end of the stick."

This Court should not accept petitioners' novel theory that would limit Congress in its ability to continue balancing the interests of copyright owners with the interests of copyright users. The decision of the District of Columbia Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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